United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

360

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23,935

UNITED STATES OF AMERICA

V.

ROBERT HAYWOOD, Appellant

APPEAL FROM DENIAL OF MOTION BY THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PURSUANT TO UNITED STATES CODE, TITLE 28, SECTION 2255

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TEXTS CITED

STATUTES INVOLVED

Title 28, United States Code, Section 2255
(June 25, 1948, ch 646, § 1, 62 Stat 967,
amended May 24, 1949, ch 139, § 114,
63 Stat 105)

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Title 18, United States Code, Section 3481
(62 Stat 833)

"In trial of all persons charged with the commission of an offense against the United States and in all proceedings in Court Martials and courts of inquiry in any state, possession or territory, the person charged should, at his own request, be a competent witness. His failure to make such a request shall not create any presumption against him."

COURT RULE INVOLVED

Federal Rules of Criminal Procedure, Rule 41(a)

(a) "Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth, or territorial court of record or by a United States commissioner within the district wherein the property sought is located."

UNITED STATES COURT OF APPEALS

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V.

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PURSUANT TO UNITED STATES CODE, TITLE 28, SECTION 2255

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant stands convicted of the commission of murder in the second degree in violation of Title 22, District of Columbia Code, Section 2401, and of carrying a dangerous weapon in violation of Title 22, District of Columbia Code, Section 3204. On June 17, 1966, the Court set aside an earlier sentence and imposed sentence of six (6) to twenty (20) years on Count 1, and one (1) year on Count 2, said sentences by the counts to run concurrently. These convictions were affirmed by this Honorable Court in Number 20262.

On July 15, 1969, Appellant filed a motion to vacate sentence pursuant to United States Code, Title 28, Section 2255, which motion was denied without hearing on January 13, 1970. The jurisdiction of this court is invoked under United States Code, Title 28, Section 1291.

STATEMENT OF QUESTIONS INVOLVED

1. WHETHER THE REMARKS MADE BY THE PROSECUTING ATTORNEY IN CLOSING ARGUMENT DEPRIVED THE APPELLANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.

2. WHETHER EVIDENCE ADDUCED AT TRIAL PURSUANT TO A SEARCH WARRANT ISSUED BY A MARYLAND JUSTICE OF THE PEACE SHOULD HAVE BEEN EXCLUDED BECAUSE OF ITS FAILURE TO CONFORM TO THE REQUIREMENTS OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

3. WHETHER THE TRIAL COURT ERRED IN DENYING, WITHOUT A HEARING, PETITIONER'S MOTION FILED PURSUANT TO TITLE 28, SECTION 2255 OF THE UNITED STATES CODE.

THIS CASE WAS BEFORE THIS COURT UNDER THE SAME NAME, NO. 20262.

REFERENCE TO RULINGS

Memorandum and Order denying Petitioner's Motion dated January 13, 1970, by the Hon. Leonard P. Walsh, United States District Judge.

STATEMENT OF THE CASE

At approximately 12:30 a.m. on August 26, 1965, one Reuben Harrell was killed by gunfire in an alley near 2nd and Upshur Streets, N.W., Washington, D. C. Appellant was arrested, tried and convicted of murder in the second degree and for possession of a dangerous weapon. The entire case against appellant was based upon circumstantial evidence, and there was no direct evidence as to the facts and dircumstances surrounding the homicide.

Two teenage witnesses, John C. Whitaker and Jimmie Johnson, testified that they, along with three other teenagers, Vinnie Whitaker, Reginald Johnson and Varnum Coleman, were at the home of Jimmie Johnson at 113 Varnum Street, N.W., approximately one block north of the scene of the homicide at 12:30 a.m. on August 26, 1965 (TR. 66, 68). At that time they heard what sounded like shots. Twenty minutes later, after hearing police sirens, they left the house, went over to 2nd Street, N.W., and saw a man lying in the alley. John Whitaker identified a photograph of the victim, Reuben Harrell, as that of the man he had seen in the alley (TR. 68).

Three other teenage witnesses, Larry Windon, Lawrence Wilkerson, and Timothy Bisset, testified that they,

along with another teenager, Roscoe Goodwin, were sitting on the porch of the Rock Creek Cafe, located on the south side of Upshur Street near the corner of 2nd and Upshur Streets at 12:30 a.m. (TR. 80, 81).

Another witness, Berkley L. Fitts, testified that he was in an alley in the vicinity of his apartment at 4210 2nd Street, N.W., at the same time (TR. 113). The witnesses Windon, Wilkerson, Bisset and Fitts testified that they had heard shots around 12:30 a.m. (Tr. 80, 96, 101, 113). After hearing the shots, Wilkerson crossed over to the north side of Upshur Street in front of the Upshur Tavern (Tr. 96). There Wilkerson met Fitts, who testified that he came to the tavern after hearing the shots (Tr. 117). The witnesses Windon, Wilkerson, Bisset and Fitts testified that they saw a man coming from an alley that opened onto Upshur Street (Tr. 181, 97, 103, 117). Windon could not identify the man, but testified that he had a swing in his walk similar to the appellant's walk (Tr. 97). Bisset could not identify the man, but testified he had a "walk" like the appellant (Tr. 104). Fitts identified the man as the appellant (Tr. 118).

There were three possible exits in the alley (Tr. 112).

Two bullet slugs were removed from the deceased, Reuben Harrell, during the performance of an autopsy by the

medical examiner (Tr. 75). A detective removed another slug from the left side view mirror of the automobile which the deceased drove (Tr. 140). A ballistics expert from the Federal Bureau of Investigation testified that the three slugs were .38 special caliber bullets of a Winchester or Western manufacture and had been fired from a Colt revolver or a Spanish made copy of a Colt revolver (Tr. 153).

Pursuant to a search warrant issued by a Maryland Justice of the Peace, the police found some spent casings and slugs on the ground of appellant's farm in Maryland (Tr. 154). The ballistics expert who examined these casings and slugs could not testify that the same gun fired these bullets as well as those recovered from the decedent's body and car (Tr. 174), but they were fired from the same type of guns as the two that appellant had purchased several months prior to the death of the decedent (Tr. 194).

Mary Toggins, the common law wife of the decedent, testified that the decedent and the defendant were good friends (Tr. 199). On the night in question the decedent received a telephone call at approximately 11:00 p.m., and the decedent left their apartment shortly thereafter (Tr. 198). She also testified that approximately three weeks before the decedent's death, the defendant was walking up to and looking in the

apartment window (Tr. 200). He asked for Mr. Harrell who was not there (Tr. 200).

At the scene of the homicide, a police officer found four marijuana seeds in the decedent's vehicle (Tr. 235, 238). The police also found a palm print which was characterized as "fresh" on the right rear door of the decedent's automobile (Tr. 206) which matched the defendant's palm print (Tr. 217). However, it was conceded by the government's expert witness that the print could have been on the decedent's automobile for as long as five days (Tr. 228).

Several days later, the appellant was arrested at his farm at Hagerstown, Maryland. He was brought back to the District of Columbia for trial.

In his argument to the jury, the prosecutor made reference to the decedent's death as a "gangland slaying" (Tr. 421), called attention to the defendant's failure to testify in his own behalf (Tr. 447, 419) and advised the jury that they, being citizens of the United States, the plaintiff in this matter, had an interest in prosecuting the defendant (Tr. 451, 452). The defendant was acquitted of murder in the first degree, but found guilty of murder in the second degree and of possession of a dangerous weapon.

SUMMARY OF ARGUMENT

I. The evidence obtained at the Appellant's farm was improperly seized in that the search warrant did not comply with Rule 41(a), Federal Rules of Criminal Procedure.

II. Remarks made by the prosecuting attorney in closing arguments deprived the Appellant of a fair trial and due process of law.

III. The Trial Court erred in denying without a hearing Appellant's motion to vacate sentence pursuant to Title 28, Section 2255 of the United States Code, because it was not conclusively shown that Appellant was entitled to no relief.

ARGUMENT

I. THE EVIDENCE OBTAINED AT THE APPELLANT'S FARM WAS IMPROPERLY SEIZED IN THAT THE SEARCH WARRANT DID NOT COMPLY WITH RULE 41(a), FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 41(a) of The Federal Rules of Criminal Procedure authorizes the issuance of search warrants by "...a judge of the United States, or of a state, commonwealth, or territorial court of record or by a United States commissioner within the district wherein the property is located." The Fourth Amendment of the Constitution protects the individual from unreasonable search of his person and property. In order to assure police adherence to this Constitutional mandate, the courts have consistently demanded strict compliance in the issuance of a search warrant and in restricting the search to the terms of the warrant.

The search of Appellant's farm constituted a "federal search" in that a federal officer or agent had a hand in the search at some point in time between the entry into the premises and the testimony in court, and participated in the decision to use the evidence in court. Although a federal agent was not present while the actual search and seizure was in progress, the fact that the investigating police officer from the Metropolitan Police Department delivered the evidence to an agent of the Federal Bureau of

Investigation is sufficient to constitute this search as a "federal search". In discussing the question of "federal search", the United States Supreme Court in Lustig v. United States, 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1949) stated:

> "It surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with a view to its use in a federal prosecution, or the federal agent himself takes the article out of a bag. It would trivialize law to base legal significance on such a differentiation."

The evidence seized in the instant case at the farm was handed to an F.B.I. Agent for his critical inspection with a view towards its use in a federal prosecution. Therefore, Rule 41(a) clearly controls the issue of whether the search warrant is legal. The warrant was issued by a Maryland Justice of the Peace who was not a judge, either Federal or state, of a court of record, nor was he a United States commissioner.

In the case of Navarro v. United States, 400 F.2d 315 (1968), a search warrant issued from a state court not of record was held illegal and evidence resulting from the search under that warrant was held to be improperly admitted. The facts in that case closely parallel those in the instant

case: (1) A federal search was conducted. (2) The warrant was not issued by a court of record or a United States Commissioner.

Even though the issuance of the warrant was authorized under local law, the court in Navarro held that this did not conform to the requirements of Rule 41(a). Rule 41(a) is exclusive in that it names all those having power to issue warrants for a "federal search". Navarro held that the authority to issue warrants in a situation controlled by Rule 41(a) exists "...only insofar as granted by the rules and no further".

Since the search warrant in the instant case was authorized by a Justice of the Peace who had no authority under Rule 41(a) to issue warrants, the warrant and thus the search were illegal, and the trial court's admittance of that search into evidence was improper.

II. REMARKS MADE BY THE PROSECUTING ATTORNEY IN CLOSING ARGUMENTS DEPRIVED THE APPELLANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.

There were several instances in which the Prosecutor's remarks tended to prejudice the jury and removed the air of impartiality upon which a fair trial is based. The prosecutor called attention to the jury members' personal interest in the case by stating:

> "The Defendant is not the only party to this lawsuit. There are two parties. It says here, 'The United States of America v. Robert Haywood'. If this case had been brought in a state court instead of in a federal court the caption would have been 'The People v. Robert Haywood'. But we are in a Federal jurisdiction and it says 'The United States'. In the states it would have said 'The People'. Who are the people of the United States but you?
>
> So, ladies and gentlemen, you have an interest in this case also." (Tr. 451-452).

Such remarks placed the members of the jury in the role of prosecutors of this action, and appealed to their personal interest in the case. Earlier the prosecutor stated, "So, ladies and gentlemen, this is a gangland slaying and we do not want it to come to Washington." (Tr. 421).

The duty of a prosecuting attorney is not necessarily to convict a defendant, but rather to ensure a fair trial. McFarland v. United States, 80 U.S. App. D.C. 196, 150 F.2d 593 (1945), cert. den. 66 S.Ct. 472, rehearing den. 66 S. Ct. 526; Berger v. United States, 295 U.S. 78.

"It has been said that it is as much the duty of a prosecuting attorney to see that a person on trial is not deprived of any of his statutory or constitutional rights as it is to prosecute him for the crime with which he may be charged." 42 Am. Jur. Prosecuting Attorneys, Section 20.

The prosecutor also characterized the Appellant most unfavorably when he said, "But it is up to you, ladies and gentlemen, to determine whether or not his /deceased's/ life can be taken under the circumstances and the assassin go free." (Tr. 443) (Emphasis Added).

The above remarks appealed to basic fears and prejudices of the jury and gave the jury a personal stake in the outcome.

The prosecutor called attention to the Appellant's exercise of his constitutional right of silence.

With respect to Mrs. Togan's testimony that the Appellant had been looking through the window at night, some time prior to the deceased's death, the prosecutor stated, "Ladies and gentlemen, that is devastating because it stands unrefuted. Her testimony stands." (Tr. 415). Who but the Appellant could have refuted this? Her testimony indicates only she and the Appellant were present.

In discussing an expert's opinion of a palm print on the deceased's vehicle, the prosecutor stated, "Therefore, in his candid and professional opinion, it was a clean, fresh print, and he compared it, ladies and gentlemen, with a known palm print of this Defendant, and he said he definitely concluded unequivocally that the print on that car is the palm print of the Defendant. Has it been refuted? It has not." Again, in discussing the purchase by the Appellant of guns, he stated, "It stands unrefuted this man had bought two .38 pistols at that time." (Tr. 419). Again, the prosecutor referred to Mrs. Togan's confrontation with the Appellant when he said, "He /the defense attorney/ doesn't see the significance of this man just a few weeks...that is the Defendant...looking in the window of the deceased's home. He doesn't deny it. There is no denial. It is uncontradicted." (Tr. 447). Apparently, this last remark refers to defense counsel's not denying the testimony. However, this can just as easily be applied to the Appellant, especially when viewed in the context that there were only two people present on that occasion.

The above comments of the prosecuting attorney were aimed directly at the Appellant's failure to testify, and these remarks could do none other than prejudice the jury.

The constitutional privilege of a defendant against self-incrimination and its corollary, the prohibition against prosecutorial comments on a defendant's exercise of that right must be enforced by the courts. Tomlinson v. United States, 68 U.S. App. D.C. 106, 93 F.2d 652, 114 A.L.R. 1315 (1938), cert. den. 58 S.Ct. 645; Milton v. United States, 71 U.S. App. D.C. 394, 110 F.2d 556 (1940); VanStorey v. United States, 77 A.2d 318 (1951). "There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18 (1967).

In Wilson v. United States, 149 U.S. 60 (1893), the court stated: "If the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted." c.f., Stewart v. United States, 366 U.S. 1 (1961). Such comments not only violate the constitutionally protected right but also further protection provided by the Congress in 18 USC § 3481, which allows no presumptions to be made for the defendant's failure to testify. c.f., Griffin v. California, 380 U.S. 609 (1965); Chapman v. California, supra.

In White v. United States, ____ A.2d ____ (D.C. App.) No. 4666, decided January 8, 1969, by the D. C. Court of Appeals and reported in 97 WLR 209, a conviction was

reversed due to improper comments made by the prosecutor in his closing remarks to the jury. The appellant in that case, as in this case, offered no evidence, nor did he testify. The court held that comments such as: " 'You have heard nothing to the contrary,' and 'there has been no testimony to the contrary'* * * clearly called the jury's attention to the fact that the appellant had not testified and, therefore, such comments were improper and prejudicial." The court felt that statements of this nature were so prejudicial as to be beyond cure by the court's latter instruction to the jury.

The prosecutor's statements were so prejudicial as to deprive appellant of his right to a fair trial, and appellant is entitled to a new trial.

III. THE TRIAL COURT ERRED IN DENYING WITHOUT A HEARING APPELLANT'S MOTION TO VACATE SENTENCE PURSUANT TO TITLE 28, SECTION 2255 OF THE UNITED STATES CODE, BECAUSE IT WAS NOT CONCLUSIVELY SHOWN THAT APPELLANT WAS ENTITLED TO NO RELIEF.

Title 28, Section 2255, affords a prisoner the opportunity to seek review of his imprisonment. Under its provisions, the Appellant is entitled to a prompt hearing as to his allegations. In the instant case, it was not conclusively shown that Appellant was not entitled to the relief requested. At a minimum, Appellant should be afforded the opportunity to present evidence to the Court as to his allegation of ineffective assistance of counsel, especially in light of the legality issue of the search and seizure.

In his motion filed below, appellant alleged that he had instructed his attorney to file a motion to suppress the evidence obtained pursuant to the search warrant. Such a request, if made, is one that does not relate merely to trial tactics, but such a motion if granted could have materially affected the evidence presented and therefore the verdict. The government's entire case was built upon circumstantial evidence. It would be impossible to state which evidence impressed the jury in formulating its decision.

Appellant should be afforded an opportunity to present testimony as to the nature of the requests he made of counsel to suppress the evidence obtained pursuant to the illegal search warrant. At such a hearing, his attorney would be afforded the opportunity to answer these allegations and the court would then have a basis for deciding whether or not appellant was deprived of the effective assistance of counsel.

CONCLUSION

Wherefore, for the reasons stated above, it is respectfully submitted that the order denying Appellant's motion be reversed, and that Appellant be awarded a new trial.

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OF COUNSEL: MARVIN M. WALDMAN

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing brief was served upon Thomas Flannery, Esquire, United States Attorney, by leaving a copy of the same at his office, U. S. Court House, this 30th day of October, 1970.

STEVEN M. KATZ

SUPPLEMENTAL BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,935

UNITED STATES OF AMERICA

v.

ROBERT HAYWOOD, APPELLANT

APPEAL FROM DENIAL OF MOTION BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA PURSUANT TO UNITED STATES CODE, TITLE 28, SECTION 2255

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v.

ROBERT HAYWOOD, APPELLANT

APPEAL FROM DENIAL OF MOTION BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA PURSUANT TO UNITED STATES CODE, TITLE 28, SECTION 2255

SUPPLEMENTAL BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Whether a justice of the peace in Maryland is a judge of a court of record.

2. If not, whether on that account the issuance of the search warrant in this case contravened the Fourth Amendment.

ARGUMENT

THE ISSUANCE OF THE SEARCH WARRANT IN THIS CASE CONTRAVENED THE FOURTH AMENDMENT.

Under the laws of the State of Maryland, a justice of the peace is not a judge of a court of record. Article IV, Section 1 of the Constitution of the State of Maryland provides as follows:

> The Judicial power of this State shall be vested in a Court of Appeals, Circuit Courts, Orphans Courts, such Courts for the City of Baltimore, as are hereinafter provided for, and Justices of the Peace; all said Courts shall be Courts of Record, and each shall have a seal to be used in the authentication of all process issuing therefrom. The process and official character of Justices of the Peace shall be authenticated as hath heretofore been practiced in this State or may hereafter be prescribed by Law. [1]

The office of the justice of the peace is not a court of record. Hahn v. State, 188 Md. 166, 52 A.2d 113 (1946), Co. Commrs. Charles County v. Wilmer, 131 Md. 175, 101 A. 686 (1917).

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1. Effective July 1, 1971, the Constitution of the State of Maryland was amended by substituting a system of District Courts which are Courts of record replacing the system of justices of the peace.

In the very recent case of Coolidge v. New Hampshire, 39 U.S.L.W. 4795 (June 21, 1971), the Supreme Court held that evidence seized pursuant to a search warrant signed by a New Hampshire justice of the peace was improperly received in evidence thus violating the accused's Fourth Amendment rights. In that case, the justice of the peace who authorized the search warrant was the Attorney General of the State of New Hampshire who prosecuted the case against the defendant. The Constitution requires a neutral and detached magistrate. In Coolidge the magistrate and the police were one and the same. That situation was so flagrant that the Court would not consider whether any judicial officer would have issued the warrant.

Article 4, Section 42 of the Constitution of the State of Maryland provides:

> "The Justices of the Peace and Constables, so appointed, and commissioned, shall be conservators of the Peace...."

The only function at common law of a justice of the peace was to act as a conservator of the peace or keeper of the peace. The Maryland legislature conferred upon the justices of the peace certain limited criminal and civil jurisdiction. Weikel v. Cate, 58 Md. 105 (1881). In

response to an inquiry by a Maryland justice of the peace as to what his duties are, the Attorney General of the State of Maryland quoted with approval an earlier opinion of a previous Maryland Attorney General as follows:

> "'Since a conservator of the peace was at common law an arresting officer, it is our view that such power has been retained in the office of justice by virtue of the above quoted constitutional provisions; and a justice may arrest for violations of law committed in his presence.'"

(Volume 42, Annual Report and Official Opinions of the Attorney General, 264, 266).

The Maryland Constitution does not impose any qualifications of citizenship, age or residence, and such qualifications if imposed by the legislature would not be mandatory. 13 Maryland Law Encyclopedia, Justices of the Peace, Sec. 2. For the courts of law, these requirements are constitutional in addition to the requirement that the judges be selected from those admitted to practice law in Maryland and "most distinguished for integrity, wisdom and sound legal knowledge." Article IV, Section 2, Constitution of the State of Maryland.

The question of improper search and seizure is one of the most complex areas of the law. See Mr. Justice Harlan's opinion in Coolidge. To allow a magistrate who is not required to conform to even minimal standards of legal qualifications and who functions at least partially as a police officer to pass on the propriety of a search warrant at such a critical stage of the criminal process is to effectively deny an accused of his Fourth Amendment rights.

CONCLUSION

Wherefore, for the reasons stated, it is respectfully submitted that the order denying Appellant's motion be reversed, and that Appellant be awarded a new trial.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon Thomas Flannery, Esquire, United States Attorney, by leaving a copy of the same at his office, U. S. Court House, this 23rd day of July, 1971.

Marvin M. Waldman

MARVIN M. WALDMAN

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,935

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT HAYWOOD, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
MARY E. FOLLIARD,
CHARLES H. ROISTACHER,
Assistant United States Attorneys.

Cr. No. 1089-65
(C.A. No. 1954-69)

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether, in spite of his failure to raise an alleged procedural violation of FED. R. CRIM. P. 41 (a) before trial, during trial or on direct appeal, appellant can now do so in a collateral attack on his conviction?

2. Whether, in spite of appellant's failure to object at trial or to raise the issue on direct appeal, this Court should now, in this collateral proceeding, consider appellant's argument that certain portions of the prosecutor's closing argument were improper, and if so, whether the prosecutor's remarks were so prejudicial as to warrant collateral relief after affirmance of appellant's conviction?

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* This case has previously been before this Court on direct appeal in *Haywood* v. *United States*, D.C. Cir. No. 20,262, decided December 16, 1966. On February 21, 1967, appellant's petition for rehearing *en banc* was denied. The instant appeal is taken from the denial of a motion to vacate sentence pursuant to 28 U.S.C. § 2255.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,935

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT HAYWOOD, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two-count indictment filed September 20, 1965, appellant was charged with first-degree murder (22 D.C. Code § 2401) and carrying a pistol without a license (22 D.C. Code § 3204). On April 21, 1966, after a four-day jury trial before the Honorable Leonard P. Walsh, appellant was found guilty of the lesser included offense of second-degree murder and guilty as charged on the weapon count. On June 17, 1966, appellant was sentenced to concurrent prison terms of six to twenty years for murder and one year for carrying the gun. His conviction was affirmed by this Court, *Haywood* v. *United States*,

D.C. Cir. No. 20,262, decided December 16, 1966, and his petition for rehearing *en banc* was denied on February 21, 1967.

On July 15, 1969, appellant filed *pro se* in the District Court a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. Appellee filed an opposition to this motion, and on January 13, 1970, the trial judge, in a written memorandum and order, denied appellant's motion without a hearing. The District Court found that the motion, files and records in the case conclusively showed that a hearing was unnecessary and that appellant was not entitled to relief. This appeal followed.

The Trial

Apart from appellant, there were no eyewitnesses to the murder of Reuben Hildon Harrell. The deceased was found bleeding and unconscious in an alleyway off Upshur Street, N.W., shortly after midnight on August 27, 1965 (Tr. 61-63, 70, 112, 138). The Government's circumstantial case was established through a mosaic of twenty witnesses, at the core of which was a clutch of four experts in ballistics, fingerprinting, medicine and narcotics.

The trial witness who last saw the deceased alive was his common-law wife, Mary Togans, with whom he had been living for the past two years (Tr. 197-198). Sometime between 11:45 p.m. and midnight, shortly before his death, he received a phone call at their home at 620 Morton Street, N.W., and as a result of this call left the house and used her new Chrysler for which he possessed the registration and the key (Tr. 197-199). She asked him to bring her back an "R-C" (a soft drink) because she "wanted to take an aspirin pill" (Tr. 198).

Approximately half an hour later, at about 12:30 a.m., Lawrence Wilkerson was standing outside a cafe located across the street from the access to an alley off Second Street and heard the night punctuated by a volley of "around four" shots (Tr. 94-95). It was evidently these

shots that did the mischief to Harrell, who was found shortly thereafter in the alley, lying prone alongside the Chrysler (Tr. 61-62, 138). The door on the driver's side (left front) was open, and there was "a pretty good amount" of blood on the driver's seat (Tr. 138-139). He had been shot three times, a wound in the upper left chest proving lethal (Tr. 74-76). The other wounds were in the back of the left forearm and through the left elbow (Tr. 75). Except for the dome light, the automobile lights were off (Tr. 138). The left rear window was shattered (Tr. 141), and the deceased had an irregular jagged laceration of his right cheek, one inch in diameter, containing a glass fragment (Tr. 74).

Just after the shots were fired, Wilkerson saw a man emerge from the alley, which had two exits, and turn onto Upshur Street (Tr. 96). Three other witnesses—Berkley Fitts, Larry Windon and Timothy Bissett—also saw him (Tr. 117, 81, 102). As he proceeded along Upshur Street he was variously described as walking "in a very swift manner" (Tr. 119, Fitts); "fast" (Tr. 88, Windon); "kind of fast" and hurriedly" (Tr. 103, 109, Bissett). Halfway towards Third Street he tried unsuccessfully to hail a cab (Tr. 103, 117). Then, to one witness, "it looked like he got into a little run" (Tr. 103) before he disappeared around the next corner (Tr. 117, 119).

Berkley Fitts, an Internal Revenue employee, positively identified appellant as the man who came out of "the alley where the murder occurred . . . passed me . . . [and] headed down Upshur Street" (Tr. 114, 117-118). Appellant walked by Fitts, who was standing in front of a well-lighted tavern entrance on a well-lighted street (Tr. 117-118). Although the other witnesses were unable to give facial identifications, Wilkerson stated that appellant whom he had noticed in the courthouse, had the same "swing in his walk" as the man who came out of the alley access (Tr. 97-100); Bissett also noticed this similarity (Tr. 104). Expert testimony buttressed

the identifications: appellant's palm print was "dusted" from the Chrysler, having been found slightly to the rear of the right door (Tr. 190, 206-208, 212). Because of the "extreme contrast" it was "particularly noticeable" that the print was "fresh" (Tr. 209), although it could not be scientifically established exactly when it was put on the Chrysler (Tr. 228).

After leaving the scene of the crime, appellant in his flight found himself at the Greyhound bus station, where, at approximately 3:00 a.m., he initiated a brief conversation with a friend, who was a red cap porter, and boarded a bus (Tr. 176-179). He did not appear nervous or agitated (Tr. 179). Appellant was next seen in Hagerstown, Maryland, about two hours later. A cab driver picked him up at the Greyhound bus station there and drove him twelve miles to his farm in the mountains, where he was arrested later that day (Tr. 180-182, 186).

The proof of appellant's guilt was strengthened by three important clusters of facts. First, earlier in the month of the shooting appellant who knew the deceased and was described as being his "friend," was seen by Mary Togans outside their bedroom window one weekday night at about 10:00 o'clock (Tr. 199-200). When he saw her, he asked if Harrell was at home, was told "no" and left (Tr. 200).

Second, the presence of a few marijuana seeds "stuffed underneath the front seat of the Chrysler" (Tr. 234-235, 238) provided support for the Government's theory that this was a "gangland" slaying arising out of the deceased's trafficking in narcotics (Tr. 412-413, 421).[1]

Third, two slugs were removed from the deceased's body, and a third slug was recovered from under the side view mirror on the driver's side of the Chrysler (possibly the bullet that passed through the deceased's left elbow) (Tr. 75-76, 140). The three bullets were

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[1] The record contains no evidence that a fight occurred on the murder scene. A robbery motive is discredited by the fact that the deceased's wallet was recovered from his body (Tr. 144).

found to have been identical .38 special caliber bullets, all fired from a Colt revolver or a Spanish-made copy thereof which is rifled with six lands and groves twisting to the left (Tr. 152-153, 156, 169-170). An identical slug of a different brand name recovered from a fence post outside appellant's farm house[2] (Tr. 164-165, 171) showed that it was a .38 special caliber bullet fired from a .38 Colt Cobra or a Spanish-made copy thereof which is rifled with six lands and groves twisting to the left (Tr. 169). Because of the mutilated status of the four bullets, the expert could not say "without question" that all four bullets were fired from the same gun (Tr. 174-175). Appellant was shown to have purchased a .38 caliber Colt Cobra (with a two-inch barrel) in April 1965, four months before the killing, and a second gun—a .38 special caliber Colt Cobra—a week earlier (Tr. 193-194).

It was stipulated that appellant did not have a license to carry a gun on the day in question. (Tr. 242).

Appellant did not testify. His defense was an attack on the sufficiency of the Government's case (Tr. 428-429), buttressed by an attempt to show that appellant had a legitimate reason for leaving the District and was not driven by an attempt to flee. Appellant's real estate broker in Hagerstown testified that appellant met with him on the morning after the crime in an appointment made the day before (Tr. 301-307).

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[2] A United States Commissioner's arrest warrant was issued for appellant in Washington on August 27, 1965. He was arrested by the Maryland State Police on this date on his farm in Keedysville, Maryland, near Hagerstown. Shortly thereafter, pursuant to a search warrant issued by a Maryland justice of the peace, appellant's farm was searched by Detective Joseph O'Brien of the Metropolitan Police. The .38 slug was recovered from the fence post during that search. Also found inside appellant's farmhouse were five .38 special caliber cartridge casings which were of the same brand as the slugs taken from the murdered man's body. The casings and slug were introduced into evidence without objection (Tr. 164-165, 169-171, 186-188, 190-192, 241).

ARGUMENT

I. Appellant's claim of violation of FED. R. CRIM. P. 41(a) is not cognizable in a collateral attack on his conviction.

Appellant, citing one case[3] decided over two years after his conviction and his unsuccessful appeal, argues now that his conviction should be vacated and he be given a new trial because his farm was searched pursuant to a search warrant that was not issued in accordance with FED R. CRIM. P. 41 (a). Specifically he seeks reversal because the casings and slug were recovered during the search and the warrant was "issued by a Maryland Justice of the Peace who was not a judge, either Federal or state, of a court of record, nor was he a United States Commissioner" (Brief for Appellant at 10). Appellant's position is untenable because his argument is a procedural one that is not cognizable under 28 U.S.C. § 2255. *Kaufman* v. *United States*, 394 U.S. 217 (1969); *Hill* v. *United States*, 368 U.S. 424 (1962); *Sunal* v. *Large*, 332 U.S. 174 (1947).

Appellant's farm was searched pursuant to a warrant which is not attacked for its failure to support probable cause in violation of the Fourth Amendment (*i.e.*, on constitutional grounds) but for its failure to comply with a rule of procedure. In collateral attack proceedings, the scope of judicial review is limited to constitutional error, and a motion under § 2255 is not cognizable "where the error does not trench on any *constitutional* rights of defendants nor involve the jurisdiction of the trial court." *Sunal* v. *Large*, *supra*, 332 U.S. at 182 (emphasis added). *See also Fay* v. *Noia*, 372 U.S. 391 (1963). Alleged procedural violations simply are not the proper subject of

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[3] *Navarro* v. *United States*, 400 F.2d 315 (5th Cir. 1968). In *Navarro* the Court reversed a conviction on *direct appeal* for noncompliance with Rule 41, where evidence was obtained pursuant to a search warrant issued by a city judge that was not from a court of record. *Contra*, *Gillespie* v. *United States*, 368 F.2d 1 (8th Cir. 1966).

a § 2255 motion, and appellant's claim cannot now be considered by this Court. *Hill* v. *United States*, *supra*; *Clifton* v. *United States*, 125 U.S. App. D.C. 257, 258 n.3, 371 F.2d 354, 355 n.3 (1966), *cert. denied*, 386 U.S. 995 (1967).[4]

II. This Court should not now consider appellant's argument that certain portions of the prosecutor's closing argument were improper; but assuming *arguendo* that this Court chooses to consider this argument, it is meritless.

(Tr. 143, 194-195, 431-432, 441, 451-452)

Appellant collects several comments of the prosecutor in his closing argument to the jury and, in spite of his failure to object at trial or to complain about the prosecutor's argument on direct appeal, he now urges reversal, claiming that some of the remarks were so prejudicial that they deprived him of a fair trial. He also argues that other closing remarks by the prosecutor amounted to a prohibited comment on appellant's failure to testify at trial. We strongly disagree.

First we submit that this Court need not even reach the merits of appellant's argument. Failure to object

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[4] In *Kaufman* v. *United States*, *supra*, the Supreme Court recognized that a claim of *unconstitutional* search and seizure is cognizable in a § 2255 proceeding. However, the Court made it clear that it was referring to constitutional error and was not departing from *Sunal* v. *Large*, *supra*. *See* 394 U.S. at 222 n.7. Cases interpreting *Kaufman* have emphasized that its holding is applicable to only constitutional error. In *Tucker* v. *United States*, 138 U.S. App. D.C. 345, 427 F.2d 615 (1970), this Court, citing *Kaufman*, held that trial errors of *constitutional* magnitude were cognizable on a collateral attack of a conviction. In *Pineda* v. *Craven*, 424 F.2d 369 (9th Cir. 1970), the court, citing *Kaufman*, permitted a Sixth Amendment *constitutional* claim. In *Mackey* v. *United States*, 411 F.2d 504 (7th Cir. 1969), the appellant's claim of a violation of the self-incrimination clause of the Fifth Amendment was held to be cognizable in collateral proceedings because, in accordance with *Kaufman*, it was premised on a *constitutional* violation. In *United States* v. *Ballentine*, 410 F.2d 375 (2d Cir. 1969), it was held that *Kaufman* applied only to *constitutional* error and did not allow jury instructions to be attacked collaterally.

to any assertedly offensive portions of a closing argument to the jury normally forecloses consideration of the issue even on direct appeal. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Gass* v. *United States*, 135 U.S. App. D.C. 11, 19, 416 F.2d 767, 775 (1969); *Karikas* v. *United States*, 111 U.S. App. D.C. 312, 296 F.2d 434 (1961). Indeed, without objection at trial, the comments of the prosecutor must, in order to be noticed even on direct appeal, be obvious error and seriously affect the fairness, integrity or public reputation of judicial proceedings. *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 239. Since appellant was convicted of a very serious offense, we assume that this Court, when this case was before it on direct appeal, scrutinized the entire record with particular care and examined it for the existence of possibly prejudicial error, even plain error which appellant did not raise. *See Lampe* v. *United States*, 110 U.S. App. D.C. 69, 70, 288 F.2d 881, 882 (1961) *(en banc)*; *Tatum* v. *United States*, 88 U.S. App. D.C. 386, 388 n.3, 190 F.2d 612, 614 n.3 (1951). We further assume that this Court, having affirmed appellant's conviction on direct appeal and having denied his petition for rehearing *en banc*, found no such serious prejudicial error affecting the integrity of the judicial proceedings. This Court therefore need not consider appellant's argument on this appeal from the denial of collateral relief. *Lampe* v. *United States*, *supra*.

Assuming *arguendo* that appellant can raise this issue now and that this Court elects to consider his argument in spite of the presumption that the record was found to be free of prejudicial error on direct appeal, appellant's argument must fail on the merits. We agree with appellant that the prosecutor may not directly comment on an accused's failure to testify at trial,[5] but we strongly disagree with appellant's assertion that the prosecutor made any such comments in the case at bar. Appellant

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[5] *See Griffin* v. *California*, 380 U.S. 609 (1965).

points only to the prosecutor's reference to certain Government testimony as being unrefuted and uncontradicted. Such references time and time again have been specifically held not to be a comment on the defendant's failure to testify. "It is only where the Government's evidence on a material issue *in dispute* could be rebutted solely by the defendant's testimony that it is improper for the prosecutor to characterize the Government's proof as uncontradicted." *United States* v. *Hart*, 407 F.2d 1087, 1090 (2d Cir.), *cert. denied*, 395 U.S. 916 (1969) (emphasis added). *See also Ruiz* v. *United States*, 365 F.2d 103 (10th Cir. 1966); *Desmond* v. *United States*, 345 F.2d 225 (1st Cir. 1965); *Peeples* v. *United States*, 341 F.2d 60 (5th Cir.), *cert. denied*, 380 U.S. 988 (1965); *Davis* v. *United States*, 279 F.2d 127 (4th Cir. 1960); *Leathers* v. *United States*, 250 F.2d 159 (9th Cir. 1957). Mrs. Togans' testimony concerning appellant's looking through her window at a time prior to the crime, about which the prosecutor commented, was never in dispute. In fact, appellant's counsel attempted to use it to his advantage by arguing that after appellant looked for the deceased "he didn't duck down and he didn't try to get away without being seen" (Tr. 441). The prosecutor's comment in reference to the unrebutted testimony that appellant's palm print appeared on the murdered man's car was likewise on a matter not in dispute, and again appellant sought to profit by it in arguing to the jury that "Mr. Haywood saw Mr. Harrell the day before or the day before that or the day before that. He perhaps, got in his car and [because they were acquainted] took a ride with him [and] put his hand on the car . . . ." (Tr. 431.)[6] Finally, the prosecutor's comment that it was uncontradicted that appellant pur-

[6] In any event, this comment referred to the expert witness' testimony, and since appellant, if he wished to dispute this testimony, could have called his own expert witness, it is not the type of testimony that "could be rebutted solely by the defendant's testimony . . . ." *United States* v. *Hart*, *supra*, 407 F.2d at 1090.

chased two .38 caliber pistols prior to the murder again related to a matter not in dispute. In fact, appellant attempted to show that it was not uncommon to own such weapons, observing and arguing that they are "the second most popular revolver in the country today" (Tr. 194-195, 432). Clearly, then, under the applicable case law, none of the prosecutor's remarks can be construed in any way as a comment on appellant's failure to testify.[7]

Appellant's other complaints about the prosecutor's closing argument are equally meritless. The quotation appearing on page 12 of appellant's brief in which the prosecutor stated that the people of the United States "have an interest in this case also" (Tr. 451-452) is taken out of context. This quotation was preceded by a plea to the jury from the prosecutor to do their duty "*in fairness to the defendant*" (Tr. 451) (emphasis added), and it was followed by the prosecutor's statement that "[w]e are relying on you, ladies and gentlemen, to see that justice is done as you see it in this case, recognizing the rights of both parties. Don't violate the rights of Robert Haywood. But by the same token don't violate the rights of the people of the United States." (Tr. 452.) We cannot see how this part of the prosecutor's argument taken in context, prejudicially appealed to the personal interests of the jurors.

As to the prosecutor's reference to appellant as the "assassin" in a "gangland slaying," we submit that, given the leeway permitted to counsel in the heat of debate and the fact that there was some evidence to

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[7] The only applicable case cited by appellant, *White* v. *United States*, 248 A.2d 825 (D.C. Ct. App. 1969), in no way contradicts the cases we have cited above, because in *White* the "Government's evidence established that appellant was the only person who could have contradicted the testimony . . . ." 248 A.2d at 826. In addition, the evidence which the prosecutor said stood uncontradicted (that White struck the first blows in an altercation) in fact related to a material issue in dispute.

support this theory of the motive for the killing,[8] this remark, which failed to elicit any objection from appellant at trial, was not so prejudicial as to warrant a reversal of appellant's conviction on direct appeal. *Carter* v. *United States*, D.C. Cir. No. 21,591, decided December 8, 1970; *Pritchett* v. *United States*, 87 U.S. App. D.C. 374, 185 F.2d 438 (1950), *cert. denied*, 341 U.S. 905 (1951); *Harris* v. *United States*, 63 App. D.C. 232, 71 F.2d 532, *cert. denied*, 293 U.S. 581 (1934); *Funk* v. *United States*, 16 App. D.C. 478 (1900). *A fortiori* it provides no basis to vacate his conviction in this collateral proceeding.[9]

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[8] The prosecutor suggested to the jury that the decedent might have been involved in narcotics traffic because marijuana was found in his car along with his bullet-ridden body. The fact that this marijuana was found was first brought out by appellant's counsel during cross-examination (Tr. 143).

[9] Finally appellant argues that the District Court erred in denying his § 2255 motion without a hearing. Specifically, appellant maintains that because his § 2255 motion in the District Court alleged that he told his trial counsel to file a motion to suppress evidence and it was not filed, "[a]t a minimum, appellant should be afforded the opportunity to present evidence to the Court as to his allegation of ineffective assistance of counsel, *especially in light of the legality issue of the search and seizure*" (Brief for Appellant at 17) (emphasis added). We find this argument, like its companions, unavailing. On a claim of ineffective assistance of counsel "an accused may obtain relief under 28 U.S.C. § 2255 if he shows both that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense," and appellant's burden in this regard is very heavy. *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 339-340, 379 F.2d 113, 116-117 (1967). Appellant's argument that he was deprived of the effective assistance of counsel is guided with twenty-twenty hindsight by the holding of *Navarro* v. *United States*, *supra*. This Court has specifically refused to reassess, with the benefit of hindsight, the judgment of defense counsel in failing to file, or electing not to file, a motion to suppress. *Edwards* v. *United States*, 103 U.S. App. D.C. 152, 154, 256 F.2d 707, 709, *cert. denied*, 358 U.S. 847 (1958); *cf. Brady* v. *United States*, 397 U.S. 742 (1970). Regardless of whether appellant told his trial counsel to file a motion to suppress in *1966*, we cannot see how counsel's failure to do so then could be considered gross incompetence blotting out a substantial defense based upon a *1968* decision in another circuit.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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SUPPLEMENTAL BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,935

UNITED STATES OF AMERICA, Appellee,

v.

ROBERT HAYWOOD, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
CHARLES H. ROISTACHER,
Assistant United States Attorneys.

Cr. No. 1039-65

I N D E X

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED

In the opinion of appellee, the following issue is presented:

Whether, in spite of the fact that the search warrant in the case at bar was issued by a neutral and detached magistrate based upon probable cause, appellant's Fourth Amendment rights were violated?

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,935

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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SUPPLEMENTAL BRIEF FOR APPELLEE

ARGUMENT

The issuance of the search warrant in the case at bar bid not contravene the Fourth Amendment.

In appellant's supplemental brief he argues that the issuance of the search warrant by the Maryland justice of peace in the case at bar contravened the Fourth Amendment for two reasons. We strongly disagree[1/] and again[2/] submit that the alleged procedural violation of

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1/ We agree with appellant that a justice of the peace in Maryland is not a judge of a court of record. See Hahn v. State, 188 Md. 166, 52 A.2d 113 (1946).

2/ In our original brief and at oral argument we maintained that a failure to comply with the precise requirements of Rule 41(a) is a procedural and not a constitutional violation. Navarro v. United States [Navarro II], 429 F.2d 928 (5th Cir. 1970), so holds.

Fed. R. Crim. P. 41(a) is not a constitutional argument that is cognizable under 28 U.S.C. § 2255. Kaufman v. United States, 394 U.S. 217 (1969); Hill v. United States, 368 U.S. 424 (1962); Sunal v. Large, 332 U.S. 174 (1947).

First appellant tries to liken the facts in the instant case to those in Coolidge v. New Hampshire, 91 S. Ct. 2022 (1971). In Coolidge the Supreme Court once again held that to be constitutionally valid a search warrant must be issued by a neutral and detached magistrate, and that a state attorney general who was "actively in charge of the investigation and later was to be chief prosecutor at the trial" was not sufficiently neutral and detached. 91 S. Ct. at 2029. With Coolidge in mind, appellant attempts to show that a Maryland justice of the peace[3/] could not have been neutral and detached simply because he was a conservator of the peace and had the power to arrest. This argument distorts Coolidge. First of all, Md. Const. art. 4, § 6, provides that all judges, by virtue of their office, are conservators of the peace. If appellant's logic were applied, no Maryland judge would be qualified to issue

3/ On July 1, 1971, a new system of District Courts was established in Maryland, and the office of justice of the peace was abolished.

warrants because he too would not be neutral and detached. Moreover, Fed. R. Crim. P. 41(a) itself would be unconstitutional because it authorizes federal judges, as well as state judges of courts of record and United States Commissioners, to issue search warrants. These judicial officers also have the power to arrest. See 18 U.S.C. § 3041. In our view all that Coolidge requires is that the justice of the peace authorizing the search warrant must not also have the conflicting role of advocate or criminal investigator for the state. Appellant does not suggest, nor is there a scintilla of evidence to indicate, such a conflict in the case at bar.

Appellant's next argument, as we understand it, is that his Fourth Amendment rights were violated because a Maryland justice of the peace "is not required to conform to even minimal standards of legal qualifications . . ." (Supplemental Brief for Appellant at 6). Again we view appellant's claim as insubstantial. While it is true that there were no specific qualifications for justices of the peace in Maryland, there were likewise no statutory qualifications imposed for United States Commissioners.[4/] Of course,

4/ United States Magistrates have now replaced United States Commissioners and must meet certain minimal statutory requirements for appointment. See 28 U.S.C. §§ 631-639.

Fed. R. Crim. P. 41(a) authorized United States Commissioners to issue search warrants; indeed, that was one of their primary functions.[5/] If we were to follow appellant's argument to its logical conclusion, Rule 41(a), at least as far as it authorized commissioners to issue warrants, would be unconstitutional. Such a constitutional argument would be frivolous because the Supreme Court itself has specifically prescribed the Federal Rules of Criminal Procedure[6/], including Rule 41(a). See 327 U.S. 825 (1946).

Justices of the peace had the statutory authority to issue search warrants in Maryland. See Md. Ann. Code art. 27, § 551 (1957). It is upon the existence of probable cause, and upon no other basis that the justice of the peace authorized such a warrant. Scott v. State, 4 Md. App. 482, 243 A.2d 609 (1968). Since appellant does not attack the warrant in the case at bar for its failure to establish probable cause, and since as mentioned above, there is no viable evidence to indicate that the warrant

5/ A United States Commissioner, whose power included arresting, imprisoning and bailing offenders, as well as issuing search warrants, was in essence a "justice of the peace of the United States." United States v. Maresca, 266 F. 713, 720 (S.D.N.Y. 1920), aff'd, 277 F. 727 (2d Cir. 1921), cert. denied, 257 U.S. 657 (1922).

6/ Congress has specifically authorized the Supreme Court to prescribe the rules of procedure in Federal Courts, as well as proceedings before the United States Commissioner. See 18 U.S.C. § 3771.

was not issued by a neutral and detached magistrate, appellant's constitutional rights have not been infringed.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
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JOHN A. TERRY,
CHARLES H. ROISTACHER,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing Supplemental Brief has been mailed to the attorney for appellant, Steven M. Katz, Esquire, Suite 405, 7826 Eastern Avenue, N.W., Washington, D.C., 20012, and to Marvin M. Waldman, co-counsel, this 25th day of August, 1971.

Charles H. Roistacher

CHARLES H. ROISTACHER
Assistant United States Attorney